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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITIONER'S REPLY TO BRIEFS OF RESPONDENTS

Judd Lees
Williams, Kastner & Gibbs
2000 Skyline Drive
10900 N.E. 4th Street
Bellevue, Washington 98004

Maurice Baskin
*(Counsel of Record)*
Samuel T. Morison
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

Attorneys for Petitioners

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Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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## PETITIONER'S REPLY TO BRIEFS OF RESPONDENTS

Petitioner, Willmar Electric Service, Inc., hereby replies to Respondents' Briefs in connection with the petition for writ of certiorari.

At the outset, the Respondent National Labor Relations Board has conceded that the question of whether a professional union organizer is a bona fide employee applicant within the meaning of the NLRA presents an important recurring issue as to which an irreconcilable conflict exists among the circuits. NLRB Brief at 16, 19. The Board, the Petitioner and the *amici curiae* representatives of the business community are therefore in agreement that this case is appropriate for review by the Court and that the Petition should be granted, at least as to the first question presented. The sole purpose of this Reply brief is to address certain factual inaccuracies in the Brief filed by the Intervenors and to demonstrate that review is appropriate as to *each* of the questions presented.

**1. Contrary to the Intervenors' Claim, the Factual Record Squarely Presents the Petitioned-For Issues.**

Interveners have erroneously argued that the petition should be denied because of alleged deficiencies in the record below. Specifically, Intervenors have quoted out of context from portions of Michael Hendrix's testimony at trial in an attempt to show that he would not have been concurrently paid by the union while working for the Petitioner and should therefore not be considered a union employee/agent. Intervenors' Brief at 9.

The Intervenors' attempt to dispute Hendrix's status as an employee of the union was implicitly rejected by the Court of Appeals and did not constitute a basis for the court's decision. Pet. App. A4. In any event, the Intervenors have failed to dispute the controlling fact that Hendrix was employed as the Union's organizing agent *at the time of his application for employment with the Petitioner*, and he gave no indication to the Petitioner that he would cease that employment. It is thus irrelevant what undisclosed arrangements were made between Hendrix and the Union as to his payment or supposed leave status in the event that he had been hired by the Petitioner.

Moreover, contrary to the Intervenors' claims, the record evidence shows that Hendrix had no intention of abandoning his employment with the Union while purporting to work for Petitioner. Rather, when viewed in context, Hendrix's testimony makes it abundantly clear that he intended to retain dual employment with the Union while attempting to organize Petitioner's workforce.

At trial, Hendrix professed merely to be "unsure" about his post-hire compensation arrangements.[1] He was quite clear

[1] Hendrix first stated that he "probably" would cease getting paid by the union, but that he would "still retain the title of organizer." J.A. 34. Later Hendrix admitted that he did not know whether he would continue to be paid

that it was part of his duties as a paid union organizer to seek employment with non-union companies,[2] and that he would continue to act under the direction and control of his union employer while working for Petitioner. Specifically, in the testimony immediately following the passage quoted by Intervenors, Hendrix testified as follows:

> Q: So you're assuming you'd take a leave of absence from employment with IBEW Local 46?
>
> A: I don't know. I have to honestly say I don't know.
>
> Q: You don't know whether you'd continue to be under the direction of — is it Mr. Jordan that you report to?
>
> A: I would always be organizing.
>
> Q: Okay. You would be acting at his direction?
>
> A: I would be acting in my direction.
>
> * * * *
>
> Q: Who gave you employment with IBEW Local 46?
>
> A: Dave Jordan.
>
> Q: So my question was, did you respond, did you continue to respond to Mr. Jordan?
>
> A: I still do.
>
> Q: Okay. He knew you were trying to organize Willmar Electric, among others?
>
> A: Yes, sir. J.A.

J.A. 39A-40.

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by the union, or be compensated for any shortfall in his wages by virtue of having taken a job with Petitioner, because he had not discussed that issue with his union employer. J.A. 38.

[2] Hendrix stated, for example, that it is "normal activity for field organizers to go out in the field. . . . It's understand [sic] that we're seeking employment organizing." J.A. 37.

Thus, the record in this case amply demonstrates both that Hendrix was acting in his capacity as a professional union organizer when he applied for a job with Petitioner and that he would have continued to act under the direction of his union employer if he had been hired.

Based upon these facts, and the record citations in the Petition itself, this case squarely presents the issue of whether a professional union organizer/agent must be treated indistinguishably from a bona fide employee applicant under the Act.[3]

### 2. Contrary to the Intervenors and the NLRB, the Second Requested Issue Has Been Preserved Throughout the Appeal

The Board and Intervenors have both argued that the petition should be denied as to Petitioner's second argument, whether the likelihood of a professional organizer's disloyalty constitutes a defense to a charge of unlawful refusal to hire under Section 8(a)(3). According to Respondents, there is allegedly no proof that Hendrix's likely disloyalty was one of the reasons for his rejection by Petitioner. The Board contends that the record in this case "does not raise any issue concerning whether an employer can justify its refusal to hire an organizer because of his concerns about disloyalty." NLRB Brief at 21. Likewise,

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[3] Intervenors have further erroneously equated Hendrix's status to that of a union sympathizer or "zealot". Int. Brief at 18. As the Fourth Circuit recognized in *H.B. Zachry Co. v. NLRB*, however, an individual employed by a labor union is dependent on and owes a duty of loyalty to that organization, while a mere sympathizer has no such obligation inconsistent with his regular employment duties. *See* 886 F.2d at 73. Furthermore, under the common law of agency, upon which the Court of Appeals relied when interpreting the term "employee" under Section 2(3) of the Act, the right to direct the actions of another is at the heart of the employer-employee relationship and distinguishes employment status from volunteerism. *See* Restatement (Second) of Agency § 226 (relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service).

Intervenors argue that Petitioner failed to challenge in the Court of Appeals the Board's ruling that "its refusal to hire Mr. Hendrix was motivated by union animus under the *Wright Line* test," so that Petitioner is now precluded from challenging that finding in this Court. Intervenors' Brief at 11.

Contrary to Respondents' claims, however, Petitioner conceded nothing at the Board or in the Court of Appeals regarding its motivation for refusing to hire Hendrix. Both in its briefs below and at oral argument, Petitioner specifically argued that it was justified in refusing to take Hendrix's application seriously, among other reasons, *because* his status as a professional union organizer was inimical to loyal service to the company.[4] In this regard, Petitioner argued that the same facts which established Hendrix's employment with the union not only precluded him from being considered to be a bona fide applicant but, as an alternative, provided a proper motivation for Petitioner's refusal to hire Hendrix under Section 8(a)(3).

The Court of Appeals and the Respondents appear to contend that a claim of likely disloyalty could not be relied upon by Petitioner unless the disloyalty was somehow independent of Hendrix's union activities. Pet. at A7; NLRB Brief at 20. In a case where the disloyalty threat arises from a union agent's very employment as a union organizer, however, such a standard makes no sense and would be impossible to meet.

As stated in the petition, the Board itself has recognized that an employer is not required to wait until an actual breach of

[4] In its exceptions and brief to the Board, Petitioner appealed the ALJ's finding that its refusal to hire Hendrix because his application was made pursuant to his full-time union employment responsibilities was "an admission of improper motive" and that its failure to consider Hendrix's application seriously "constituted a violation of the NLRA." Willmar's Exceptions to the ALJ's Decision at 4. Petitioner reiterated these exceptions in its briefs to the Court of Appeals. *See* Brief of Petitioner at 26; Reply Brief of Petitioner at 10 n.9; *see also* J.A. 19-20, 145-147, 167, 198.

loyalty occurs to take protective action, where an employee is in a conflict situation. *See, e.g., Raytheon Co.*, 279 NLRB 245, 249 n.11 (1986) (conflicts of interest are by their nature anticipatory or potential). The Board decisions cited in the petition, Pet. at 16-18, stand for the principle that it is not a violation of the Act to take an unfavorable employment action against an employee, where an employer has a good faith belief that the employee will act in derogation of his duty of loyalty to the employer.[5] Consequently, because there is ample evidence in the record to demonstrate Petitioner's good faith belief that Hendrix had such a conflict of interest, the second question presented for review is also supported by the record.

### 3. Respondents' Arguments Misstate National Labor Policy

The Respondents' arguments are premised upon a failure to acknowledge that, as a matter of national labor policy, employers and professional union organizers have an inherent adversity of interest. NLRB Brief at 14-15; Intervenors' Brief at 14-20. As more fully set forth in the petition and by *amici curiae*, Respondents' assertions completely ignore the plain language and underlying structure of the Act, and the previous decisions of this Court, which clearly recognize the competing interests of employers and unions. Indeed, it is the D.C. Circuit's failure to properly take into account the adversarial

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[5] This principle has recently been confirmed by the Board's decision in *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (Dec. 16, 1992), in which the Board held that an employer may lawfully refuse to consider the application of a paid union organizer who seeks employment and, at the same time, leads a strike against the employer. The Board recognized that the employer had a "substantial and legitimate business justification" for declining to hire the union agent. *Id.* at 17. It is significant to point out in this context that, concurrent with his efforts to obtain employment with Petitioner, Hendrix also led picketing activity against it. J.A. 7-9, 42-47, 278A-C. Indeed, Petitioner's project foreman told Hendrix that "its kind of hard to hire you when you're out there on the other side, picketing." J.A. 19-20.

relationships codified in the Act which requires the reversal of its decision.

As set forth in the petition, this Court has held that the NLRA treats unions and management as "separate factions in warring camps."*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting). *See also Carpenters' Union v. NLRB*, 357 U.S. 93 99-100 (1958) (NLRA strikes a balance between the "uncontrolled power of management and labor to further their respective interests"). The Act codifies this adversary relationship in numerous ways, which are designed to prevent either side from interfering with the independence of the other. *See* 29 U.S.C. §§ 152(2) and 152(3) (excluding from definition of "employee" any person employed by a labor organization not acting as an employer); 29 U.S.C. § 158 (a) (2) (prohibiting employer assistance to labor organizations); and *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992); *see also Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *enf'd* 711 F.2d 383 (D.C. Cir. 1983) (permitting employers to discharge supervisors who support union representation); *Scofield v. NLRB*, 394 U.S. 423 (1969) (permitting union to expel members who aid management by working during a strike). The arguments of the Respondents and of the Court of Appeals obliterate the distinction between union professional agents and bona fide employees and, if adopted, will unfairly tilt the balance of power in the organizing process.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

Judd Lees
Williams, Kastner & Gibbs
2000 Skyline Drive
10900 N.E. 4th Street
Bellevue, Washington 98004

Maurice Baskin
*(Counsel of Record)*
Samuel T. Morison
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

Attorneys for Petitioners

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